

# Criminal Procedure: It Wasn't Always So

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It is hard to imagine a law school curriculum without a course in criminal procedure. Today, law schools struggle to decide whether criminal procedure should be taught in the first year or upper level curriculum; whether it should be combined with the study of substantive criminal law; whether it should be limited to one course or have spinoff courses to cover specific areas such as habeas corpus or computer crimes; and whether an appropriate number of credit hours have been awarded for this subject matter. Yet, despite these discussions, criminal procedure is firmly entrenched in the law school curriculum. But it was not always this way.

Perhaps equally incomprehensible is a world where there is a dearth of criminal procedure casebooks. With few prominent Supreme Court opinions and no law school classes covering this subject, there was no need for course materials fifty years ago.

Today it is a given that there are criminal procedure courses in law schools and an ever-expanding list of casebooks and study guides, with one of the original casebooks authored by Professor Yale Kamisar now in its fourteenth edition with six co-authors.<sup>1</sup> And there are also many annual supplements to provide students with new cases and materials of that year's Supreme Court decisions. Although the past had few materials, the concerns of today are more focused on whether the criminal procedure books should be one or two volumes, whether habeas corpus materials needs a separate book, and the appropriate balance between state and federal materials.

This backdrop provided the creation of the panel titled *Teaching Criminal Procedure: Fifty Years of Experience*, a panel held at the 2015 Southeastern Association of Law Schools (SEALS) Conference. Although others participated as a part of this panel,<sup>2</sup> the keynote speakers were Professors Yale Kamisar and Jerold Israel. The two essays that follow capture the essence of the presentations by these two professors.

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<sup>1</sup> YALE KAMISAR, WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING, ORIN S. KERR & EVE BRENSIKE PRIMUS, *MODERN CRIMINAL PROCEDURE: CASES, COMMENTS, AND QUESTIONS* (14th ed. 2015).

<sup>2</sup> The panel was moderated by Professor Stephen Singer of Loyola University New Orleans. In addition to Professors Kamisar and Israel, the panelists were Professors Steven Friedland of Elon University School of Law, Jancy Hoeftel of Tulane University Law School, and myself.

Professor Kamisar started the conversation by discussing the birth of criminal procedure as a course and the development of its accompanying materials. Professor Israel provided part two, with the birth of the second child, the bail-to-jail course, and its accompanying materials.<sup>3</sup> Both spoke about the faculty curriculum committee discussions during these times, the schools that made advances in the direction of adding these courses, and how many other schools followed this lead. In listening to this discussion in a modern environment that experiences the tensions between theory and practice, it is clear that criminal procedure as a course was experiencing this very same tension fifty years ago.

Although the growth of the criminal procedure courses were necessitated by cases such as *Miranda*<sup>4</sup> and *Gideon*,<sup>5</sup> the Supreme Court's development of this area of the law brought with it a statutory and case-law explosion. The accompanying materials used to teach these courses today range from highly theoretical to problem-based to state-influenced to practical applications—with some attempting to accomplish all of these approaches. Perhaps the only consistency in the courses and accompanying material is the legal base that provides this discussion.

From no published materials over fifty years ago to a multitude of course materials and law review articles today, much has changed. Some things, however, have not changed. Despite the criminal law and criminal procedure divide, the Association of American Law Schools still retains one section called Criminal Justice that includes both of these courses, as well as many other discrete spinoffs from these subjects, such as white collar crime, federal criminal law, drug crimes, and computer crimes.

In their presentations at SEALS, Professors Kamisar and Israel told the story of the history and development of the criminal procedure course. Of importance, is that the initial development of the law was conducted in a highly ethical manner, a strength that allowed the subjects to develop without being politicized, while still being subject to reflection and advocacy.

For the many of us who teach these courses today, it is important to hear the story of how this curriculum was born, how law and practice were brought together, and the importance of an ethical reflection on the law.

Thank you Professors Kamisar and Israel, and all the others, who brought criminal procedure into the academy and helped develop it during the past fifty years. The SEALS program concluded with the awarding of plaques to Professors Kamisar and Israel for their fifty years of contributions to criminal procedure.

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<sup>3</sup> KAMISAR ET AL., *supra* note 1.

<sup>4</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>5</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).